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IN THE

Supreme Court of the United States

October Term, 1957

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

—v.—

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus Curiae*

The American Civil Liberties Union is filing this brief by permission of this Court, granted on October 14, 1957 in response to its motion.

The ACLU is a nonpartisan nation-wide organization devoted exclusively to the protection and advancement of the rights and liberties guaranteed to the individual by the Constitution and basic to a free society. *Amicus* is concerned with the instant case because, according to the allegations of the complaint, members of a Congressional investigating committee have assumed the function of barring individuals from the pursuit of their calling on the basis of their behavior before or in relation to the Com-

mittee. In particular, according to the complaint before the Court, the Committee members thus implemented the Committee's disapproval of a witness who invoked the Fifth Amendment's privilege against self-incrimination in the Committee hearings. The ACLU is also concerned with the issue in the instant case of whether a State court can refuse to recognize that any legal injury arises, if those who control employment in a calling, in combination with members of Congress, bar individuals from pursuing that calling because of their invocation of Federal Constitution rights and their conduct before a committee of the United States Congress.

Statement

Proceedings—The briefs of the parties describe the proceedings below, which terminated in the affirmance of the dismissal of the complaint by the highest court of California to hear the case, the District Court of Appeal (R. 77-78), and the refusal of the California Supreme Court to review this ruling (R. 78-79).

Allegations of the Complaint—The petitioners, according to the complaint, had worked in the motion picture industry as writers, actors, and other professional employees for periods of from five to 25 years and all had reputations for high professional competence (R. 29, 38, 12, 14). The respondents are members of the Un-American Activities Committee of the House of Representatives[1] and a committee investigator, herein termed Committee respondents, as well as the major corporate and individual motion picture producers and distributors of the United States, who control, directly and indirectly, all motion picture production and distribution in the United States and employment opportunities therein, herein termed industry respondents (R. 29-34, pars. II and III).

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[1] Only two members of the Committee actually appeared as respondents (R. 60-62).

The complaint alleges, and it was and must be assumed for the purposes of this motion to dismiss,[1] that the respondents agreed and arranged to bar from employment, in the motion picture industry anyone who did not meet the Committee's standards of politically acceptable employees (R. 35, par. V, R. 37, par. VII). In particular, anyone who, relying on his Constitutional rights including the privilege against self-incrimination of the Fifth Amendment, refused to answer questions before that Committee, was to be denied employment, as well as anyone named by any witness before the Committee as a Communist who did not thereupon appear before it as a witness (R. 35, par. V). To effectuate this bar to employment, the respondents, according to the complaint, have published and are publishing a list of writers, actresses, and others working in the indusfry who so refused to testify or so failed to appear before the Committee; they have circulated, and are circulating this list throughout the motion picture production, distribution, and exhibition fields; they have induced and persuaded employers in the motion picture industry other than respondents to refuse employment to anyone on this list; and the industry respondents have themselves refused to employ anyone listed (R. 35-36, par. V).

Eighteen of the petitioners allegedly have been excluded from employment in the motion picture industry as a result of respondents' agreement and activity, because they had, relying on their Constitutional rights, and in particular the privilege against self-incrimination, refused to answer questions before the Committee, and five because they had failed to appear after being named as Communists.[2] Petitioners pray for both injunctive relief and damages (R. 40-41).

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[1] See *Collins* v. *Hardyman*, 341 U. S. 651, 652.

[2] R. 36, 38, 39; as to reliance on the privilege against self-incrimination, R. 67, and Hearings, excerpted in Appendix to Respondents' Brief in District Court of Appeal, on file with the Clerk of this Court.

State Court's Ruling and Failure to Pass on Federal Question—The State court ruled that the complaint failed to state a cause of action against any of the respondents, on the ground petitioners did not allege there were any specific contract or business relations which would have been consummated but for respondents' alleged agreement and activity pursuant thereto, but had alleged only a general expectation of employment (See R. 74, 76, 77). The Court reached this result largely on the basis of a prior State decision holding insufficient a complaint respecting a refusal to rent certain office space to a real estate broker (R. 70-71).

In resting on this ground to dismiss petitioners' complaint, the State court ignored the violations of Federal rights which the complaint established and which petitioners had raised. Our argument will show that the deprivation of Federal right in no way depended on the existence of a specific contractual or business relation; and the State court's holding on this point therefore cannot defeat the assertion of Federal rights. *Davis* v. *Wechsler*, 263 U. S. 22, 24. This Court will, of course, pass on whether the complaint states a cause of action for violation of Federal right, although the State court failed to do so. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

Questions to Be Argued by *Amicus*

Our brief will concentrate on two arguments:

(1) The allegations of the complaint show a transgression of the Fifth Amendment's guarantee of the privilege against self-incrimination. Under the Supremacy clause, the State court must recognize and redress this invasion of petitioners' Constitutional right and for this purpose must reinstate the complaint against all respondents.

(2) Because the alleged exclusion of petitioners from their calling involves and affects the protection of the Fifth

Amendment privilege, the operations of a Congressional committee, and Federal statutes and policies, the question of whether such exclusion establishes a legally cognizable injury is a Federal question, ultimately to be determined by this Court. Under the applicable precedents, deprivation of the right to pursue one's calling must be deemed sufficient basis for a cause of action.

Questions Properly Presented to this Court—The questions we will argue were presented below and in the petition for certiorari.

Petitioners have at all times stressed the infringement of their privilege against self-incrimination guaranteed by the Fifth Amendment. The trial court discussed fairly fully whether or not, as a State court, it was obliged to accord a remedy for an infringement of the Fifth Amendment privilege (R. 46-48). The petitioners' brief on appeal, which concededly was the appropriate medium for raising questions in the State courts, argued that the Fifth Amendment privilege, as part of the Supreme law of the land, must be protected by the State courts (Opening Brief for Plaintiffs in District Court of Appeal, on file with the Clerk of this Court, pp. 25-32). That Court, though failing to accept petitioners' contention, realized that the privilege was involved (R. 67). Again, in the petition for certiorari, petitioners raised the question of Federal supremacy and the consequent obligation of the State courts to give a remedy for the infringement of the Fifth Amendment privilege (Pet. for cert., pp. 3, 27, 31).

In the Court below petitioners also stressed Federal policy and precedents with respect to interference with a Federal privilege and with respect to the right to pursue a calling (Op. Br. Dist. Ct. App., pp. 28, 18-21). In their petition for certiorari petitioners raised the same questions, and explicitly presented the issue of the State court's obligation under the Supremacy clause to follow Federal law (Pet., pp. 3, 14-15, 24-27, 30-31).

At the very least, therefore, the points we will argue are within "the fair intendment" of the questions raised below and are presented in the petition. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67. It is not of course essential that arguments be presented there in the precise formulation presented here. See *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 598-599.

We shall not attempt fully to argue the question of whether the State court denied due process and equal protection by its refusal of a remedy, though this question too is properly before this Court, because it seems amply treated by petitioners. However, we shall comment on a few aspects of this question.

Summary of Argument

I.

Assuming the truth of the allegations of the complaint, the Committee respondents' activity with respect to barring petitioners from their calling impairs the Fifth Amendment's guarantee of the privilege against self-incrimination. The threat that anyone who invokes the privilege before the Committee will be excluded from his calling in the motion picture industry, is a grave coercion against exercise of the privilege, particularly considering that invocation of the privilege is made an absolute barrier to employment regardless of any circumstances or justifying factors. The petitioners need not show any specific employment prospect to establish the violation of the Fifth Amendment guarantee, for the right to pursue one's calling is a vital one, whether or not there is any such prospect.

From another standpoint, too, there is an impairment of the Fifth Amendment guarantee. The Committee has no authority to regulate employment in the motion pic-

ture industry or take redress against witnesses. The Congressionally authorized method of controlling or punishing witnesses before a Congressional committee is prescribed by the contempt statute (2 U. S. C. 192). By imposing an additional sanction on a witness who refuses to answer on grounds of self-incrimination—exclusion from his calling in the motion picture industry—Committee respondents are imposing an unauthorized and thus illegal condition on exercise of the Constitutional privilege.

The guarantee of the Fifth Amendment is fully applicable in determining the validity of the Committee respondents' acts. In participating in the agreement and activity as alleged in the complaint, the Committee respondents were necessarily acting by virtue of their positions as Government officials, for they had no connection with or power in the motion picture industry save by virtue of their position as members of the Congressional committee investigating it.

Under Federal law, which determines the propriety of a remedy not only against Committee respondents but against industry respondents as well, there is a right to a remedy against all respondents (if the allegations of the complaint are established), because of the pervasive effect of the violation of Constitutional right by Committee respondents.

II.

Even ignoring the applicability of Constitutional limitations to Committee respondents as Federal Government officials, the question of whether the complaint alleges a legally cognizable injury is a Federal one. The alleged agreement and activity affect the exercise of a Federal privilege guaranteed by the Constitution. Protection of this privilege is a function of the Federal Government; furthermore, Congress has explicitly condemned an agreement to inflict a deprivation on an individual because he has exercised a Federal privilege. The alleged agreement and activity of respondents lie in an area of Federal policy not only for these reasons but also because they

involve the operations of a Congressional committee; relate to the punishment of committee witnesses, a matter controlled by Federal legislation; and embrace the participation of Federal officials. Under the applicable Federal precedents, the deprivation petitioners suffered of the right to pursue their calling, through the concerted action of those controlling employment in that calling, is a legally cognizable injury, regardless of whether they had any specific employment prospects.

ARGUMENT

I. The allegations of the complaint state a cause of action for violation of Federal rights. The judgment of the Court below must therefore be reversed.

A. The Committee Respondents Have, According to the Allegations, Violated the Fifth Amendment's Guarantee of the Privilege Against Self-Incrimination. All Respondents Are Involved in the Violation of Petitioners' Constitutional Right and the Complaint thus States a Cause of Action Against All Respondents.

(1) *Interference With Exercise of the Privilege Against Self-Incrimination*

The agreement and arrangement of respondents alleged in the complaint is: if anyone working in the motion picture industry exercises before the House Un-American Activities Committee the privilege against self-incrimination guaranteed by the Fifth Amendment, he will be excluded from his calling and deprived of the possibility of following his chosen and usual means of earning a livelihood. Certainly this threat constitutes a powerful coercion against the free exercise of the Constitutional privilege. Compare *American Communications Association* v. *Douds*, 339 U. S. 382, 409; *Frost* v. *Railroad Commission*, 271 U. S. 583. And this threat of hardship must be deemed to im-

pair the Fifth Amendment guarantee whether or not it succeeds in preventing exercise of the privilege. It would "emasculate" the privilege "to deny protection against reprisals to those whom threats did not deter". See *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (C. A. 2, 1947, opinion by Judge Learned Hand). "Protection of the privilege • • • must encompass security against assault for having exercised it." *Robeson* v. *Fanelli*, 94 F. Supp. 62, 69 (S. D. N. Y., 1950).

The coercion against exercise of the privilege is particularly severe, with impairment of the Constitutional guarantee in consequence, because invocation of the privilege is treated as an absolute and unescapable bar to employment in the motion picture industry. According to the allegations of the complaint, no consideration is given to such factors as "the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege". See *Slochower* v. *Board of Education*, 350 U. S 551, 558-559.

It can hardly be argued that free exercise of the privilege was unaffected because, as the State court assumed, respondents deprived petitioners only of a general expectancy of employment rather than a specific prospect; this Court has never doubted that equal opportunity to seek employment in one's calling has utmost significance to an individual. See *Takahaski* v. *Fish Commission*, 334 U. S. 410, 415-416; *Truax* v. *Raich*, 239 U. S. 33, 38, 41; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 185 (Jackson, J., concurring. And see *Bomar* v. *Keyes, supra*.[1]

[1] It may be noted that petitioners' opportunities to follow their calling and to earn a livelihood depended on their status in the motion picture industry, rather than with any one company, since professional employment in that industry is free-lance; i.e., writers and actors are generally employed from company to company for the duration of particular films. (See Respondent's Brief in Dist. Ct. App., on file with the Clerk of this Court, p. 13, n. 11).

Thus, by participating in the absolute exclusion of petitioners from their calling because of their exercise of the Fifth Amendment privilege, the Committee respondents transgressed the Constitutional guarantee of the privilege, and failed in the Constitutional duty enjoined upon them by this Court, to be "most scrupulous in protecting its exercise." *Quinn* v. *United States*, 349 U. S. 155, 164.

The unjustifiable and arbitrary nature of the interference with the free exercise of the privilege is underscored by the fact that the Committee, according to the allegations of the complaint, was operating outside its authority. The Committee is not authorized to erect barriers to employment opportunities, either as a means of regulating the movie industry or controlling its witnesses; it is not to undertake "to 'punish' those investigated" in any way. *Watkins* v. *United States*, 354 U. S. 178, 187. The only authorized punishment for witnesses is that prescribed by the contempt statute (2 U. S. C. 192), under which, moreover, the witness can test the validity of the investigation in the courts. The method of control or punishment described in the complaint was extra-legal; the Committee respondents were operating outside the system of law established by Congress, as well as contrary to the Constitution. The Committee respondents were, therefore, imposing an unauthorized and thus illegal condition upon the exercise of the Constitutional privilege against self-incrimination. Compare *Frost* v. *Railroad Commission*, *supra*; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571; *Hannegan* v. *Esquire*, 327 U. S. 146, 156.

(2) *Applicability of Constitutional and Statutory Limitations to Committee Respondents.*

Drawing the only possible logical inference from the complaint, it is apparent that the Committee respondents were acting as Government officials and by virtue of their position as Congressional representatives in entering into

and effectuating the alleged agreement with the other respondents. While the complaint alleges that they acted "both in their official capacity" and unofficially as private individuals (R. 35),[1] they had no connection with the movie industry except through their power as representatives of the Committee investigating that industry, and their ability and resources to enter into and effectuate the agreement rested thereon. Thus, their acts, as alleged in the complaint, were subject to the Constitutional limitations on the powers of Government. Compare *Railroad Trainmen* v. *Howard*, 343 U. S. 768, 774. To preserve a Government based on law, the Constitution must apply to officials "whether they hew to the line of their authority or overstep it." *Screws* v. *United States*, 325 U. S. 95, 111. See also *Williams* v. *United States*, 341 U. S. 97, 99. As we have already shown, the restrictions implicit in the Fifth Amendment's guarantee of the privilege against self-incrimination were here transgressed.

A further possible argument against our contention that the Committee respondents interfered with petitioners' Federal rights might be that they could not themselves give or withhold employment from the petitioners. We submit, however, that the degree to which the Committee respondents could, and according to the complaint did, participate in the agreement and its effectuation, was ample to constitute a highly effective and injurious interference with petitioners' rights. The complaint alleges the Committee respondents participated and are participating in the compilation, publication, and circulation of the black-

[1] The State court adverted to, but did not pass on, the question of whether these respondents could be sued for the same acts in both capacities (R. 77). Whatever may be the correct conclusion ultimately as to the liability of these respondents in damages for their alleged acts (see cases cited by State Court, R. 77), there is no question about the right to injunctive relief against them if their acts are illegal. See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 140; *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

list; in this activity they might well be proved not only participants but the major force. Publicization of this list is an important measure of coercion and interference, especially in the context of the agreement not to employ anyone listed. Compare *Rumely* v. *United States*, 345 U. S. 41, 45, 47 affirming 197 F. 2d 166 (see especially p. 174); *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 139, 159, 175, 185, 187; *Watkins* v. *United States*, 354 U. S. at p. 197.

Further, the Committee respondents allegedly participated in inducing the industry respondents as well as the other, minor, employers in the motion picture industry to refuse employment to anyone listed (R. 35-36). The Court can judicially notice that the Committee had, over a period of years, emphasized that those who refused to conform to the Committee's standards of anti-Communism should not be employed by a motion picture company, and that the Committee would expose for public scrutiny and condemnation the employment of any such suspect persons.[1] An employer's public harassment and embarrassment through exposure by the Committee, and his consequent possible economic loss, was a serious threat (see cases cited this page supra)—of sufficient gravity so that the Committee respondents had ample means at hand to induce an employer to agree to enforce the blacklist.

Finally, with respect to the role of the Committee, the complaint alleges that the purpose of the agreement was "to limit employment in the motion picture industry to those persons whose beliefs are acceptable to the said Committee" (R. 37). Considering even apart from this allegation, that the condemnatory attitude towards witnesses

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[1] See, Carr, *The House Committee on Un-American Activities* (1952) 56-58, 452; *Josephson* v. *United States*, 165 F. 2d 82, 100 (C. A. D. C., 1947), cert. den. 333 U. S. 338; *Watkins* v. *United States*, 354 U. S. at p. 199, note 32.

who refused to answer on constitutional grounds or who failed to appear after being named, could not have taken hold unless it had been favored by the Committee, the Committee respondents might well be shown to have played the dominating role in effecting the petitioners' exclusion from employment, with the industry respondents in a sense agents to carry out Committee policies. There is some indication of this possibility in the testimony before the Committee in 1947 by the spokesman for the motion picture industry, that the producers had rejected a suggested blacklisting proposal, in part because it was thought it might be illegal. (See Hearings excerpted in Appendix to Petitioners' Brief in this Court, pp. 42-46.)

We do not in any way dispute the importance of the industry respondents in enforcing the exclusion of petitioners from their calling; however, there is no question that "the Constitution operates" on Government officials even if in some respects private cooperation is necessary to complete the circuit—to transmit to the individual the injurious impact of their acts. *Railway Employees' Dept.* v. *Hansom*, 351 U. S. 225, 232. "That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction." *Watkins* v. *United States*, 354 U. S. at p. 198.[1]

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[1] See also *Anti-Fascist Committee* v. *McGrath*: "We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them" (341 U. S. at p. 141); *Rumely, loc. cit. supra* p. 12, where exposure by a Congressional Committee was deemed to raise a Constitutional question, though the Committee's act affected the individual only because of the reaction of third parties; see also *Truax* v. *Raich*, 239 U. S. 33; *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 462.

(3) *Right to a Remedy in the State Court, Pursuant to Supremacy Clause.*

Against Committee Respondents—Considering that the Committee respondents were acting by virtue of their positions as officials of the Federal government, with the legality or illegality of their acts determined by the Constitution and laws of the United States, the right to a remedy against them is also a matter of Federal law. *Deitrick* v. *Greaney*, 309 U. S. 190, 200; *Metropolitan Bank* v. *United States*, 323 U. S. 454, 456; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366. There is no doubt under Federal law of the right to a remedy for unconstitutional acts by these officials. See *Joint Anti-Fascist Committee*, 341 U. S. at p. 140.[1] Under the Supremacy clause of Article VI of the Constitution the State court was obliged to recognize and redress the violation of petitioners' Constitutional right, since, concededly, the court's "jurisdiction is adequate for the purpose." *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 703. See also *Smith* v. *O'Grady*, 312 U. S. 329, 331; *Davis* v. *Wechsler*, 263 U. S. 22, 24.

Against Industry Respondents—With the violation of Federal right established, this Court will consider and direct the effective and appropriate remedy. See *Bell* v. *Hood*, 327 U. S. 678, 684; *Board of Com'rs* v. *United States*, 308 U. S. 343, 349; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249, 255.

Here regardless of any other bases for a remedy against the industry respondents, we submit that the Committee respondents' unconstitutional conduct alone would require

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[1] That Congressmen are liable like other Government officials, with immunity only "for what they do or say in legislative proceedings" or in a committee inquiry that "may fairly be deemed within its province", see *Tenney* v. *Brandhove*, 341 U. S. 367, 372, 378. And see *United States* v. *Bramblett*, 348 U. S. 503.

a remedy against all respondents. The agreement, the listing of petitioners, and their exclusion from employment are, under the allegations of the complaint, permeated with the violation of Constitutional right; and if the allegations are established, the violation cannot be redressed except by a judgment against all the respondents engaged in effectuating it.[1] Furthermore, there is even a possibility that the industry respondents too were in a sense acting under color of Government authority (see discussion of industry's position in 1947 hearings, p. 13 *supra*), and thus were in a somewhat similar position to the Committee respondents in relation to petitioners' Constitutional rights. Thus, it was improper for the State court to order the dismissal of the complaint against any of the respondents.

In sum, the dismissal of this complaint would frustrate Federal Constitutional and statutory provisions, and this Court's earnest pronouncements that Congressional investigating committees must hew to their authority and respect the Constitution. To effectuate these principles, the complaint must be held to state a cause of action.

B. As a Matter of Federal Law, the Allegations as to Petitioners' Exclusion from Their Calling Establish a Legally Cognizable Injury

(1) *Federal Law Determinative of the Question of Injury*

Even ignoring the applicability of Constitutional limitations to the Committee respondents as Government representatives (discussed in Point A), the right to a remedy against respondents is a Federal question, to be ultimately decided by this Court.

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[1] Compare *Barrows* v. *Jackson*, 346 U. S. 249, 258-260; and *Picking* v. *Pennsylvania R. R. Co.*, 151 F. 2d 240, 250 (C. A. 3, 1945); *Valle* v. *Stengel*, 176 F. 2d 697, 704 (C. A. 3, 1949); *Robeson* v. *Fanelli*, 94 F. Supp. 62, 70 (S. D. N. Y., 1950); *Chadwick* v. *United States*, 141 Fed. 225, 237 (C. A. 6, 1905); *Brown* v. *United States*, 204 F. 2d 247, 250 (C. A. 6, 1953).

Under the Fifth Amendment the free exercise of the privilege against self-incrimination is guaranteed in the operations of the Federal government, and it is the function of the Federal government to protect the exercise of this privilege. See *Quinn* v. *United States*, 349 U. S. 155, 164; compare *United States* v. *Cruikshank*, 92 U. S. 542, 552.

Furthermore, Congress has carried out this Federal duty by the statute providing it is a criminal offense for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or *because of his having so exercised the same.*" (18 U. S. C. 241). Clearly, the free exercise of the privilege against self-incrimination secured by the Fifth Amendment to an individual in proceedings of the Federal government, is within the intended protection of this statute. It is one of the "rights which arise from the relationship of the individual and the Federal Government" rather than one of "those rights which the Constitution merely guarantees from interference by a State." *United States* v. *Williams*, 341 U. S. 70, 77. See *United States* v. *Cruikshank*, *loc. cit. supra.* The Federal statute condemns the very activity here in issue: a group inflicting a deprivation on a citizen because he has exercised a Federal privilege.

Thus it is clear that respondents, in excluding petitioners from their calling because of their exercise of the Federal privilege, were in an area of Federal policy, established by Constitution and statute. Their alleged blacklisting agreement and activity further affects an area of Federal control and Federal concern in that it is directed at the conduct of witnesses before, and the operations of, a Congressional committee—an agency of the Federal government controlled by Congress. Congressional statute and resolution not only determine the powers and authority of the Committee, around which the whole agreement centers, but Congress has prescribed on the specific matter of

when and how witnesses are to be punished (2 U. S. C. 192). The contempt statute limits the punishment of witnesses on the basis of the pertinency of the question, and authority of the Committee: The blacklisting here in issue imposes a sanction on witnesses, without regard to the limitations prescribed by Congress. Further, the question of whether a legal injury has been inflicted on petitioners by the alleged blacklisting agreement and activity is an issue of Federal concern because Federal officials acting by virtue of their official positions are importantly involved therein.

In sum, though "the issue is uncontrolled by any formal expression of the will of Congress", the question of the implications of the Constitutional and statutory provisions, and of how the policy expressed therein is to be vindicated, is a question of Federal law. *Board of Com'rs* v. *United States*, 308 U. S. 343, 349. See *Deitrick* v. *Greaney*, 309 U. S. 190, 200; see also *Testa* v. *Katt*, 330 U. S. 386, 389-393; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176. Here where, according to the allegations of the complaint, the thrust and policy of Federal legislation has been frustrated—particularly the policy "to maintain a Federal right in its integrity"[1]—and Federal functions have been seriously affected, it is a Federal question whether a legally cognizable injury has resulted.

(2) *Injury Established by Exclusion from Calling*

The condition imposed by the California court in this case: that no injury will be recognized unless there is a specific contract of employment in prospect—sets at naught the value of the right to pursue one's calling. It means a cause of action based on the deprivation of this right would be practically impossible, for one who has been

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[1] *Powe* v. *United States*, 109 F. 2d 147, 151 (C. A. 6, 1940), cert. den. 309 U. S. 679.

excluded from consideration for employment could hardly allege a specific employment prospect. As we suggest below, this ruling was not consistent with California law (Point II). In any event, it cannot be adopted by this Court.

Considering the vital importance this Court has attached to the opportunity to pursue the calling of one's choice—deeming it part of the fundamental liberty guaranteed by due process (see cases, cited *supra*, p. 9),—it can hardly be questioned that the deprivation of this opportunity inflicts a legally cognizable injury. Furthermore, cognizance of this injury is impelled by "those flexible considerations of equity which are established sources for judicial law-making" *Board of Com'rs* v. *United States*, 308 U. S. 343, 350. Standing in contrast to the rigid view of the California court in the instant case, are the opinions in *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 139-141, 143, 157-161, 175, 185; there there were flexible and realistic concepts as to when a legal injury is suffered, as well as recognition that an injury arises from interference with the general opportunity to seek funds or employment, despite the absence of any specific contractual prospects. In the same tenor, see *International News Service* v. *Associated Press*, 248 U. S. 215, 235-236. As to the injury arising from an interference with a mere expectancy of employment, see also *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (C. A. 2, 1947, opinion by Judge Learned Hand).

Under the common law prevailing in the United States, a "concerted refusal" to enter into or continue business relations is a *prima facie* wrong, warranting a remedy unless justification is shown. While an individual refusal is not a legal wrong, a concerted refusal is so grave in its effect that it is deemed to inflict a legally cognizable injury

though there is no specific contract or relation in prospect.[1] A legal wrong also arises from an "unjustified interference with reasonable expectancies of commercial relations."[2] How much more serious was the activity alleged in the complaint, where the respondents' concerted refusal, plus their inducement of other employers, foreclosed petitioners from business relations of the type they sought, with *all* those with whom such relations were a possibility. We submit that here there can be no doubt a legally cognizable injury has been inflicted.[3]

Finally, on the question of justification for this injury, while it may not be possible to pass on this issue definitively at the present stage of the proceeding, it is to be observed that the various "public interest" considerations the respondents have suggested cannot afford them a justification when a diametrically opposite view of public policy in relation to the assertion of the Fifth Amendment privilege has been stated by this Court (*Slochower* and *Quinn, supra,* pp. 9, 16).[4] As to respondents' alleged economic justifica-

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[1] See American Law Institute, Restatement of Law of Torts (1939), sec. 765, and see illustrations, p. 47. The introduction to the volume states that it is declaratory of the "general common law of the United States" (p. x); the 1949 Supplement (p. ix) points out that there had been no departures since the 1939 draft, necessitating any change in sections 765 or 766.

See Note, Liability for Blacklisting Under the Prima Facie Tort Doctrine, 51 Columbia Law Rev. (1951) 398; Hale, Prima Facie Torts, Combination, and Non-feasance, 46 Columbia Law Rev. (1946) 196, 197; Note, Refusal to Deal as a Tort, 45 Illinois Law Rev. (1951) 784; *Aikens* v. *Wisconsin*, 195 U. S. 194, 204-206; Holmes, Privilege, Malice and Intent, 8 Harv. Law Rev. (1894) 1, 3.

[2] Restatement of Torts (1939), p. 52, commenting on sec. 766.

[3] The possibility "that damages from the nature of the tort, could only be figured approximately has no legal significance", *Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555.

[4] Compare Restatement (1939), p. 45, commenting on sec. 765: even if "the interest sought to be advanced is laudable, the concerted refusal to deal is not justified if it goes far beyond the promotion of that interest and is unduly oppressive or is otherwise prejudicial to a paramount social interest."

tion, it seems dubious that respondents will be able to show that each individual respondent's revenues would suffer unless the whole industry refused to employ petitioners. Nothing short of this would even tend to furnish an economic justification for respondents' concerted refusal and inducement of all other employers to refuse, to permit petitioners to pursue their callings. See Brief for Petitioners in this Court, pages 110-111.

II. The State Court's dismissal of the complaint denied petitioners the due process and equal protection guaranteed by the Fourteenth Amendment.

The basis of the State Court's dismissal of the complaint—that there was no right of action for an exclusion of petitioners from their calling unless a specific contractual relation was in prospect—was not a tenable basis under State law. In fact, California has recognized the right to pursue a calling as a right entitled to legal protection, and a combination to exclude an individual from his calling as a *prima facie* wrong. It has further recognized that in such a situation no specific contractual prospect need be shown or alleged since the refusal to deal makes such a prospect impossible. See *California Auto Ct. Assoc. Inc.* v. *Cohn, et al.*, 98 Cal. 2d 145, 219 P. 2d 511; *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P. 2d 329; *Bautista* v. *Jones*, 25 Cal. 2d 746, 749, 751, 155 P. 2d 343. The California court's refusal to apply this established doctrine to petitioners seems a denial of equal protection and due process. Compare *Griffin* v. *Illinois*, 351 U. S. 12, 18, and cases there cited; *Truax* v. *Corrigan*, 257 U. S. 312. The Court's departure from the law here seems particularly deplorable because the tenor of the opinion (R. 67-69) raises the thought that the Court's disapproval of petitioners' assumed ideology may have been a stimulus in this direction.

Further, it should be noted that by disposing of the complaint on the ground of no injury, the California court avoided the question of whether the respondents had justification for excluding petitioners from their calling. This issue involves questions of Federal Constitutional and statutory policy to which, under the Supremacy clause, the State court was obliged to give due regard. Here the Court was not loath to consider Federal policy in one regard (R. 67-69), but failed to do so where it was in fact more pertinent.

Not only do the decisions of the highest court of California show that petitioners have suffered a legally cognizable injury, but it is inconceivable that the law of California, as generally applied, could be as the Court here stated it. It is against reason that a State would deny all recourse to the courts, for either legal or equitable relief, to individuals who have worked in a calling and who can establish that a group which monopolizes or controls all employment opportunities therein has agreed and undertaken to bar them from employment. If in fact this were the law of a state—if in fact California permits a deprivation and a injury of such a vital nature without affording any possibility of a remedy—the State would deny due process. See *Truax* v. *Corrigan*, 257 U. S. 312; *Ward* v. *Love County*, 253 U. S. 17, 24; *Public Utilities Comm.* v. *Pollak*, 343 U. S. 451, 462.[1]

[1] In the *Pollak* case, this Court held the due process guarantee applicable to the act of an utility company because a Government agency had *permitted* the company so to act.

CONCLUSION

It is respectfully submitted that this Court should hold that the complaint states a cause of action against all respondents, and that the judgment of the Court below dismissing the complaint should be reversed.

Respectfully submitted,

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